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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

BRIEF FOR *AMICUS CURIAE* THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

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STATEMENT OF THE INTEREST OF THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN

The New York Society for the Prevention of Cruelty to Children (NYSPCC), founded in 1875 and continuously in operation since then, is the oldest child-protective agency in the world. The Society provides its services throughout New York County to a very large, diverse, and often troubled population of children at risk.

Pursuant to its charter granted under the New York State Not-for-Profit Corporation Law, the Society investigates reports of child abuse and maltreatment, provides services to families where possible to keep them intact or takes protective measures, including initiating child-protective proceedings in family court, in order to prevent further harm to the children in question. Through its legal staff, the Society also functions as guardian-ad-litem in custody and guardianship cases in the family, state supreme, and surrogate courts. Last year we protected over 1,000 children and since our inception have protected more than 1,000,000 children in over 600,000 cases.

Another major Society function is in the area of child-protective training. The NYSPCC has trained hundreds of professionals who are required by New York State law to take instruction in recognizing and reporting child abuse and maltreatment. It has also conducted a series of seminars over the past year for family court judges and lawyers in the topic "Techniques for Interviewing Child Victims of Sexual Abuse" under a grant from the New York State Department of Social Services.

The NYSPCC has a historically demonstrated interest in court proceedings involving children, particularly where the courts are dealing with the very sensitive issue of child sexual-abuse victims giving testimony concerning acts of abuse or neglect. The Society respectfully requests that this Court consider its brief of amicus curiae in furtherance of that interest.

The position of The NYSPCC is that the Court should affirm the conviction of the Petitioner, notwithstanding the availability of the four-year old child-victim, S.G., at the time of trial.

SUMMARY OF ARGUMENT

Out-of-court statements made by child sex-abuse victims are unique in that they are often the only evidence that an act of sexual abuse took place, physical evidence of sexual abuse and other witnesses to the act being absent in most cases. These statements are also special because studies in the field of child psychology show that young children rarely fabricate allegations of sexual abuse; studies also show that because of the generally inferior memories of children vis-a-vis adults, their out-of-court statements closer in time to the event are more accurate than their memories of the event at trial months or even years later.

When the out-of-court statements of a child sex-abuse victim – the need for the statements and their trustworthiness already manifest – qualify under a firmly rooted exception to the hearsay rule, the resulting enhancement of the reliability of and need for the statements renders them unassailabale to a Confrontation Clause objection.

The rationale for the holding in *United States v. Inadi*, 475 U.S. 387 (1986), applies *a fortiori* to the out-of-court statements of a child sex-abuse victim. The child's statements qualifying, for example, as spontaneous declarations are more needed and reliable than the out-of-court statements of a coconspirator. It is even less likely, with respect to a very young victim of child sex-abuse, that the flavor and the essence of the child's statements made as part of the res gestae of the crime could be recaptured at trial. The truth-seeking process is frustrated and a state's important interest in protecting sexually abused children from further trauma is thwarted if such evidence is not routinely made available to the trier of fact, whether or not the child is unavailable.

The statements of the child-victim in this case, therefore, were properly admitted notwithstanding the respondent's failure to show that she was unavailable at trial.

ARGUMENT

THE CONFRONTATION CLAUSE DOES NOT REQUIRE THE PROSECUTION TO MAKE A SHOWING OF THE UNAVAILABILITY OF A CHILD SEX-ABUSE VICTIM BEFORE THE CHILD'S OUT-OF-COURT STATEMENTS ARE INTRODUCED AGAINST A CRIMINAL DEFENDANT IF THE STATEMENTS FULLY QUALIFY UNDER A HEARSAY EXCEPTION WHOSE LACK OF THE UNAVAILABILITY FEATURE IS FIRMLY ROOTED IN TRADITIONAL RULES OF EVIDENCE

The necessity for relying on the out-of-court statements of the child sex-abuse victim is manifold. The statements of the victim, whether out-of-court or testimonial, are often the only evidence because of the lack of physical evidence in the great majority of cases,[1] and because there are usually no witnesses to these crimes.[2] In addition, studies in the field of child psychology have shown that a child's memory is inferior to an adult's,[3] and that a child's memory of an event erodes quickly.[4] The account of an event that is usually chronologically closest to the event,[5] i.e. the child's out-of-court statement related in

[1] De Jong & Rose, *Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse*, 84 PEDIATRICS 1022 (1989); Enos, Conrath and Byer, *Forensic Evaluation of the Sexually Abused Child*, 78 PEDIATRICS 385 (1986); Marshall, Puls and Davidson, *New Child Abuse Spectrum in an Era of Increased Awareness*, 142 AMERICAN JOURNAL OF DISEASES OF CHILDREN 664 (1988).

[2] *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988), *citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1986).

[3] A.D. Yarmey, *The Psychology of Eywitness Testimony*, 204-5 (1979).

[4] Stevens and Berliner, *Special Techniques for Child Witnesses* in *The Sexual Victimization of Youth*, 246, 254 (Schultz Ed. 1980).

[5] S.G.'s statements to the witnesses in the instant case were made within several minutes up to several hours after the alleged acts of sexual abuse occurred. *Illinois v. White*, 555 N.E.2d 1241, 1243-6 (1990).

court by the testifying witness, is likely to be more accurate than the child's faded memory of the event given in court often many months or even years after the event took place.[6] The courtroom setting is often so intimidating for the child witness that the truth-seeking process is interfered with or even defeated[7] when the testimonial process inhibits the child from stating all that he or she knows. In short, courts should vigilantly maintain an awareness of the basic cognitive differences between adults and children; children are different and the rules of evidence should be applied more liberally to reflect that difference. It is the experience of The NYSPCC that in a large number of cases it would simply not be possible to prosecute without relying on the out-of-court statements of the child-victim.

The out-of-court statements of the child sex-abuse victim, in particular those which qualify under traditional hearsay exceptions, have sufficient reliability to defeat Confrontation Clause objections. Studies have shown that it is unlikely that children will maintain false stories of sexual abuse to authority figures such as parents,[8] and that children in general, especially very young children such as S.G., rarely contrive false allegations of sex abuse.[9] Since the statements of a child sex-abuse victim *standing alone* have been shown, in the professional literature, to be generally reliable, their reliability is dramatically enhanced when such statements qualify under a traditional hearsay exception such as the spontaneous declaration.

Application of the spontaneous declaration exception to the hearsay rule to child sex-abuse victims has been criticized,

[6] *E.g. People v. Debreczeny*, 253 N.W.2d 776, 778 (1977) (trial begun 20 months after defendant's arrest).

[7] Goodman, Levine, Melton, and Ogden, *Child Witnesses and the Confrontation Clause*, 15 LAW AND HUMAN BEHAVIOR 13, 26-29 (1991).

[8] Stevens and Berliner, *supra* note 4, at 250.

[9] Berliner and Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 JOURNAL OF SOCIAL ISSUES 125, 127 (1984); Yates and Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation*, 145 AMERICAN JOURNAL OF PSYCHIATRY 989, 992 (1988).

however, on the basis of arguments that children often do not view an act of sex abuse perpetrated upon them as a startling or shocking event due to their lack of knowledge and experience concerning human sexuality, and because there is often a significant time lag between the act of abuse and the disclosure thereof by the child.[10] Each of these problems goes to an element of the spontaneous declaration exception, i.e. the startling event and absence of time to fabricate between the event and the declaration. 6 Wigmore, Evidence § 1750 (Chadbourn rev. 1976). These objections can be readily overcome if the prosecution demonstrates that each of the elements of the exception has been fully satisfied. It must be shown that the act of abuse constituted a startling event to the child. This can be demonstrated by eliciting information concerning the victim's knowledge of sexuality prior to the event, the general intelligence and knowledge of the child, the behavior or affect of the child at the time of the declaration and any behavioral changes thereafter, statements of the child indicating whether the event was upsetting or traumatic in any way, and any other pertinent information indicating the event was startling to the child.

In deciding whether a statement meets the requirement that the declarant did not have sufficient time to fabricate after the event, the actual time lapse is only one factor to be considered by the trial court since each instance of the rule must be treated upon its own facts and circumstances. 6 Wigmore, Evidence § 1750, p.221 (Chadbourn rev. 1976). The trial court must look to the surrounding circumstances to determine whether there was an opportunity for reflection and invention. *Ibid* at p.202. But that inquiry must necessarily consider "that it is unlikely that a child of tender years will have reason to fabricate stories of sexual abuse." *People v. Bitler*, 146 Ill.App.3d 477, 497 N.E.2d 137 (1986) *citing In re Marriage of Theis* 121 Ill.App.3d 1092, 460 N.E.2d 912 (1984); *see supra* notes 8, 9.

This Court has stated that the line of cases resulting in *Ohio v. Roberts*, 448 U.S. 56 (1980), rests on the strong similarity

[10] Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1755-58 (1983).

between prior judicial proceedings and the trial proper, given the assumption that "[f]ormer testimony is often only a weaker substitute for live testimony." *United States v. Inadi*, 475 U.S. 387, 395 (1986). In comparing and contrasting the coconspirator exemption to the hearsay rule, the Court stated:

> When coconspirators statements are offered by the government ... the statement often will derive significance from the circumstances in which it was made. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

Ibid. Even if it is assumed that *Roberts* states the general rule on unavailability of the declarant due to the Court's reliance on that case in *Idaho v. Wright*, 497 U.S.____, 111 L.Ed.2d 638 (1990), subsequent to *Inadi*, and that *Inadi* is merely an exception to the *Roberts* rule, the *Inadi* rationale applies *a fortiori* to the admission of S.G.'s statements in the instant case. The fundamentally objectionable aspect to the admission of S.G.'s statements is that cross-examination of the child is thereby precluded. But since these statements qualify as spontaneous declarations, were made by a four-year-old victim of sexual abuse very close in time to the event under circumstances that indicate a high degree of reliability,[11] and whose essence could not be recaptured by live testimony, it is "sufficiently clear ... that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." *Idaho v. Wright*, 111 L.Ed.2d at 655, *quoting* 5 Wigmore, Evidence § 1420, p.251 (Chadbourn rev. 1974).

Justice Marshall's dissent in *Inadi* focused in large part on the identity of the declarant as a coconspirator, an "outlaw", noting the ambiguities, code words, and duplicity with which coconspirators conduct business. *United States v. Inadi*, 475 U.S. at 400-411 (Marshall, J., dissenting). Those concerns, that

[11] *See supra* notes 8, 9.

legitimately raise questions concerning the reliability of coconspirator statements, are totally absent from an analysis of the out-of-court statements of a child sex-abuse victim.

By admitting the statements of a child sex-abuse victim under a firmly rooted hearsay exception such as the spontaneous declaration where those statements fully qualify under the exception, a court furthers the state's interests in protecting these children from additional trauma, *Maryland v. Craig*, 497 U.S.____, 111 L.Ed. 666, 685 (1990) while simultaneously furthering the truth-seeking process in a criminal trial because of the inherent trustworthiness of these statements. That trustworthiness, coupled with the need for such evidence and the state's interest in protecting children from additional trauma during court proceedings, outweighs a defendant's Sixth Amendment right to confrontation of the child victim.

The feature of unavailability in a hearsay exception such as the spontaneous declaration is firmly rooted in the rules of evidence in both state and federal jurisdictions.[12] Should the Court overturn such a well-settled principle of a virtually universal rule of evidence, it would be construing *Roberts* in precisely the way it warned against in *Inadi*:

> *Roberts*, however, does not stand for such a wholesale revision of the law of evidence, nor does it support such a broad interpretation of the Confrontation Clause. . . . *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

United States v. Inadi, 475 U.S. at 392, 394.

[12] *E.g.*, FED. R. EVID. 803, 804; *Jones on Evidence*, chs. 9, 10 (6th ed. 1972); M. Graham, *Cleary and Graham's Handbook of Illinois Evidence*, § 803.1 (4th ed. 1984).

In *Nelson v. Farray*, 874 F.2d 1222 (7th Cir. 1989), Justice Flaum, in a concurring opinion, stated, "I believe that *Inadi* merely reaffirms and applies the *Roberts*' principle that a showing of unavailability is not required in all situations." *Nelson Ibid* at 1231. For the foregoing reasons, your amicus submits that this is such a situation where it is not required.

Based on the experience of The NYSPCC, practicality requires recognizing, in cases similar to this, that the child is a victim of very tender years. Having due regard for the defendant, the Court should nevertheless permit the admission of a child's out-of-court statements which, although not dispositive, should be part of the prosecution's case-in-chief. We support a rule that will be fair to the accused but realistic in allowing the state to make out its case.

CONCLUSION

Since the Illinois Appellate Court upheld the admission of S.G.'s out-of-court statements under an exception to the hearsay rule firmly rooted in traditional rules of evidence, and the child's statements are inherently reliable due to the circumstances in which they were made and could not be recreated in their uniqueness at trial, the defendant's Confrontation Clause rights were not violated even though the child was not shown to be unavailable. The conviction of the defendant for aggravated sexual assault of a four-year old child should, therefore, be affirmed.

Respectfully submitted,

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